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In the Supreme Court of the United States

OCTOBER TERM, 1979

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, PETITIONER

v.

LOUISE E. SPENCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31a-41a) is reported at 591 F. 2d 985. The opinion of the Benefits Review Board (Pet. App. 27a-31a) is reported at 7 B.R.B.S. 128. The administrative law judge's opinion (Pet. App. 21a-26a) is not reported. The earlier opinion of the court of appeals (Pet. App. 20a-21a) is not reported. The earlier opinions of the Benefits Review Board (Pet. App. 7a-8a, 11a-19a) are reported at 1 B.R.B.S. 316 and 2 B.R.B.S. 308. The earlier opinion of the administrative law judge (Pet. App. 1a-6a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1979. A petition for rehearing was denied on May 3, 1979 (Pet. App. 42a). The petition for a writ of certiorari was filed on July 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer's workers' compensation insurance carrier at the time of an employment-related injury that results in the permanent total disability of a worker covered by the Longshoremen's and Harbor Workers' Compensation Act should be liable for death benefits to the worker's surviving spouse, even though such benefits were only made available by a statutory amendment passed after the termination of the carrier's insurance coverage.

STATEMENT

James Spence was seriously injured on March 24, 1967, in the course of his employment aboard ship as a longshoreman for respondent Terminal Shipping Company. Petitioner Pennsylvania National Mutual Casualty Insurance Company, which at that time was the insurance carrier for Terminal Shipping under Section 32(a)(1) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 932(a)(1), began paying him compensation under the Act for temporary total disability (see Section 8(b), 33 U.S.C. 908(b)). On January 1, 1970, Terminal Shipping became a wholly-owned subsidiary of Atlantic & Gulf Stevedores, Inc. Thirteen months later, Terminal Shipping terminated its insurance policy with petitioner and notified the Department of Labor that it would be covered under Atlantic & Gulf's self-insurance program, authorized by the Secretary under 33 U.S.C. 932(a)(2). At about the same time, Terminal Shipping consolidated its

stevedoring operations with those of Atlantic & Gulf. Terminal Shipping remained in existence as a steamship agent and has not had any employees subject to the LHWCA since February 1971 (Pet. App. 24a-25a, 28a, 32a).

Petitioner did not dispute that it remained liable for the compensation payable for James Spence's disability, and it continued to make disability payments after Terminal Shipping's policy lapsed. In January 1973, after a hearing, the Secretary's deputy commissioner (see Sections 39 and 40, 33 U.S.C. 939 and 940) determined that Spence's total disability was permanent (see 33 U.S.C. 908(a)). Petitioner, on its own behalf and on behalf of Terminal Shipping, appealed to the Benefits Review Board. The Board affirmed the award for permanent total disability in August 1973. Petitioner complied with the award without further contest until James Spence died on November 11, 1973.

Spence's widow, respondent Louise Spence, claimed death benefits under Section 9 of the Act, 33 U.S.C. 909. Before the 1972 amendments to the Act,[1] such benefits were payable only if a covered worker's death was caused by an injury sustained in the course of employment. See 33 U.S.C. (1970 ed.) 909. The amended version of Section 9 specifies an additional category of cases in which an injured worker's surviving beneficiaries are entitled to recover death benefits. Surviving beneficiaries may now recover death benefits either if an employment-related injury causes death or "if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury."

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[1] LHWCA Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251.

The parties stipulated that James Spence's death was not caused by his employment injury. Petitioner, still acting on its own behalf and on behalf of Terminal Shipping, did not repeat its earlier contention that Spence had not suffered permanent total disability as the result of his employment injury (Pet. App. 17a). Petitioner opposed respondent Spence's claim on other grounds, however.

Petitioner argued that, because the employment injury that disabled James Spence occurred before the 1972 amendments to the Act, it would be an improper retroactive application of the revised Section 9 to permit respondent Spence to recover death benefits in the absence of a showing that her husband's injury caused his death. An administrative law judge rejected this contention (Pet. App. 3a-4a), but ruled sua sponte that a valid compensation order for a worker's permanent total disability must be in effect at the time of his death in order for his survivors to recover death benefits under the portion of Section 9 added to the statute in 1972 (*i.e.*, the portion allowing recovery of death benefits without any showing that the employment injury caused death, provided the injury did cause permanent total disability). The administrative law judge further held (*id.* at 5a-6a) that the deputy commissioner's January 1973 permanent total disability determination with respect to James Spence, affirmed by the Benefits Review Board, was invalid because, after the effective date of the 1972 amendments (November 26, 1972), the deputy commissioner lacked jurisdiction to issue such an adjudicatory order.

The Benefits Review Board initially affirmed the administrative law judge's denial of death benefits to respondent Spence (Pet. App. 7a-8a), but then granted reconsideration (*id.* at 9a-10a) and reversed (*id.* at 11a-

19a). The Board held that a valid permanent total disability order is not a prerequisite to the recovery of death benefits under the portion of Section 9 added in 1972, as long as the surviving claimant can show that the deceased worker did in fact suffer permanent total disability as the result of his employment injury. Because petitioner, in the hearing before the administrative law judge, did not contest the nature of James Spence's disability, the Review Board held that respondent Spence was entitled to benefits under Section 9. The Board agreed with the administrative law judge that the amended version of Section 9 governs the right of James Spence's survivors to recover death benefits, because Spence died after the effective date of the 1972 amendments, even though his initial employment injury occurred before that date. Accordingly, the Board remanded to the administrative law judge for entry of a compensation order.

Petitioner sought immediate review in the court of appeals. Although ostensibly still acting on Terminal Shipping's behalf as well as for itself, petitioner asserted for the first time that it should not be liable for any death benefits that might be owed to respondent Spence under the amended version of Section 9. Petitioner argued that, because its insurance coverage of Terminal Shipping ceased before the effective date of the 1972 amendments, it had no obligation to pay death benefits for which the employer would not have been liable during the term of the insurance contract. The court of appeals ruled (Pet. App. 20a-21a) that it lacked jurisdiction to consider petitioner's new contention, because no "final order of the [Benefits Review] Board" had yet been issued. See Section 21(c), 33 U.S.C. 921(c). The court therefore dismissed the petition for review and returned the case to the agency.

In the ensuing proceeding before a different administrative law judge, Terminal Shipping was represented by its own counsel. Terminal Shipping contended that, because petitioner failed to raise the point during the initial administrative proceedings, it should now be estopped from denying liability for any death benefits owed to respondent Spence. Notwithstanding this assertion, the administrative law judge considered and rejected on the merits petitioner's argument that it should not be liable for death benefits payable only since the effective date of the 1972 amendments (Pet. App. 22a-23a, 25a). The critical fact, in the administrative law judge's view, was that the employment injury that led to James Spence's permanent total disability, and indirectly to his widow's entitlement to death benefits, occurred during the term of petitioner's insurance coverage of Terminal Shipping. The Benefits Review Board affirmed (*id.* at 27a-31a), and petitioner again sought review in the court of appeals.

The court of appeals affirmed (Pet. App. 31a-36a). The court explained (*id.* at 34a) that both a survivor's entitlement to death benefits and an injured worker's entitlement to disability compensation during his lifetime are based on a single event, an employment-related injury. By agreeing to insure Terminal Shipping for all its workers' compensation liability, the court held (*id.* at 34a-35a), petitioner

> put itself in the place of the employer so far as compensation benefits under the Act, whether for disability or for death, were concerned. * * * Accordingly, when it is admitted that the petitioner was the employer's insurance carrier under [33 U.S.C.] §935 at the time of the employee's injury in 1967, it necessarily follows that the petitioner

> carrier is subject to all liabilities attaching to the employer on account of the injury, both by way of compensation payments to the employee and by way of death benefits in favor of the statutory beneficiaries under §909. It is immaterial to its liability for death benefits arising out of the injury in 1967 that its policy was later terminated in 1971.

The court stressed (*id.* at 34a) petitioner's concession that Terminal Shipping is liable to pay death benefits to respondent Spence, "even though death occurred long after the employee had ceased to work for the employer and even though the death benefits had been increased between the time of injury and the time of death by the 1972 Amendments." In light of petitioner's view of Terminal Shipping's liability, the court concluded (*id.* at 36a), "its own claim of immunity lacks appeal."

Judge Widener dissented (Pet. App. 36a-41a). He took the position that petitioner should be relieved of "liability for compensating an entirely new class of claims which were only created by statute after its insurance contract with the now self-insuring employer had terminated" (*id.* at 36a). In Judge Widener's view, the result reached by the majority is inequitable because petitioner "is forced to pay claims for a new benefit[], but cannot recover its loss by adjustment or charging of premiums" (*id.* at 40a). Judge Widener contended that the additional risk created by the 1972 amendments should be placed on the insurance company (or, in this case, the self-insurance program) covering the employer at the time of the statutory change. This company, Judge Widener stated, "can adjust its premiums to compensate for the additional risk" (*ibid.*) and therefore is the appropriate party to bear that risk.

ARGUMENT

The court of appeals' decision is correct and does not conflict with the ruling of any other court. Petitioner concedes (Pet. 7) that, although the 1972 amendments to the LHWCA have been in effect for seven years, this is the first litigated case to present the question proposed for this Court's consideration. The factual situation involved here is unlikely to arise often. Moreover, because the legal issue only concerns the benefits of workers who were disabled prior to the 1972 amendments, it is of diminishing importance. Further review by this Court is not warranted.

Petitioner no longer disputes respondent Spence's entitlement to death benefits under the amended version of Section 9.[2] Petitioner contends only that it is not responsible for paying those benefits, because the congressional decision to make such benefits available occurred after the termination of petitioner's insurance coverage of Terminal Shipping.

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[2]Petitioner's acknowledgement of the applicability of the 1972 amendments to this case is well-advised, since every court of appeals that has addressed the question has agreed that when an employment injury occurring before 1972 leads to permanent total disability and death occurs after 1972, the injured worker's survivors are entitled to recover death benefits without any showing that death was caused by the employment injury. *Arvelo Puig* v. *Standard Dredging Corp.*, 599 F. 2d 467 (1st Cir. 1979); *Todd Shipyards Corp.* v. *Witthuhn*, 596 F. 2d 899 (9th Cir. 1979); *Nacirema Operating Co.* v. *Lynn*, 577 F. 2d 852 (3d Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *State Insurance Fund* v. *Pesce*, 548 F. 2d 1112 (2d Cir. 1977); *Norfolk, Baltimore & Carolina Lines, Inc.* v. *Director, OWCP*, 539 F. 2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977). Cf. *St. Louis Shipbuilding & Steel Co.* v. *Casteel*, 583 F. 2d 876 (8th Cir. 1978) (parallel new provision in Section 8(d)(3) of the LHWCA, 33 U.S.C. 908(d)(3), providing death benefits when worker suffers permanent *partial* disability as the result of employment injury, but death is not caused by injury).

Petitioner agrees that a carrier whose insurance policy covered an employer at the time of an employment injury would remain liable not only for the full duration of the worker's disability, but also for death benefits, whenever the worker died, as long as death was caused by the employment injury occurring during the policy period. Petitioner also agrees (Pet. 8-9) that in such a case the carrier would be liable for an increased rate of compensation established by a statutory amendment enacted after the employment injury and after the lapse of the insurance policy but before the worker's death. Petitioner attempts to distinguish such a case from the present one by arguing that the death benefits involved in this case—benefits for a death unrelated to an employment injury—are "a new class of benefits," rather than merely an increase in the dollar amount of an existing "class of benefits." The latter kind of legislative change, petitioner suggests (Pet. 9-10), can "reasonably be anticipated" by an insurer in setting its premium rates, while the former cannot.

Petitioner's proposed distinction cannot withstand scrutiny. The insurance policy in this case was a standard workers' compensation policy in which petitioner agreed to pay on behalf of Terminal Shipping all sums that the employer might become obligated to pay as the result of employment-related injuries occurring during the policy period. The death benefits to which respondent Spence is now entitled fall within that category. If James Spence had not been injured on the job during the period for which petitioner was Terminal Shipping's insurance carrier, no death benefits would now be owed. As the court of appeals recognized (Pet. App. 34a), a survivor's claim for death benefits must be based on an employment-related injury. Although the cause of action for such benefits only accrues at the time of death, the employee's injury is the source of liability under the

statute. That is equally true whether Congress, after the injury, decides to increase the amount of death benefits that must be paid or to eliminate the causation requirement for recovery. In either event, the insurer, having included in its policy no limitation on liability created by future legislative enactment, should be responsible for all amounts payable as the result of an employment-related injury occurring during the policy period. One kind of legislative change is no more foreseeable or unforeseeable than another, and, more important, foreseeability was not an element of the risk petitioner assumed under its policy.

Although petitioner condemns the decision below as impractical, it is petitioner's solution that is unworkable. The conduct of employment subject to the Act requires an employer to carry insurance against its potential liabilities under the Act. A company that terminates its employment of workers within the Act's coverage need not keep a policy of LHWCA insurance in effect. As it happened in this case, Terminal Shipping was still in the position of an insured employer at the time of James Spence's death by virtue of its corporate relationship with Atlantic & Gulf Stevedores and Atlantic & Gulf's status as an approved self-insurer. But that fact was fortuitous; Terminal Shipping was no longer engaged in activity subject to the Act, was not required to carry insurance, and presumably would not have done so if any premium had been payable for it. For LHWCA purposes, Terminal Shipping had essentially gone out of business. Petitioner's suggestion that, in circumstances like those presented here, the employer's insurer at the time of a relevant statutory change should bear liability for newly-payable death benefits would frequently encounter an objection of impossibility, for there often might be no such insurer, nor any employer still in existence, when the statute is

amended or when the worker dies. For this additional reason, therefore, the administrative law judge, the Benefits Review Board, and the court of appeals correctly ruled that a standard workers' compensation insurance policy covering a specified time period covers all workers' compensation liability of the employer, whenever it might arise, based on the employer's conduct of employment subject to the Act during the policy period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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